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Bruce T. Worthen v. Shurtleff and Andrews, Inc. v. The Department of Finance, Successor of the Commission of Finance, Administrator of the State Insurance Fund : Respondent's Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

BRUCE T. WORTHEN,
Plaintiff and Respondent,

vs.

SHURTLEFF AND ANDREWS, INC., a corporation,
Defendant,

vs.

THE DEPARTMENT OF FINANCE, Successor of THE COMMISSION OF FINANCE, Administrator of THE STATE INSURANCE FUND,
Intervenor and Appellant.

Case No. 10651

RESPONDENT'S BRIEF

Appeal from the Judgment of the District Court
for Salt Lake County
Honorable A. H. Ellett, Judge

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STATEMENT OF THE KIND OF CASE

This action was commenced by Bruce Worthen to recover damages from the defendant, Shurtleff and Andrews, Inc., for injuries received in an industrial accident which occurred while Bruce Worthen was working for H. E. Lowder Milk Company, while he was in the course and scope of his employment. He received medical payments and

workmen's compensation from his employer's carrier, the State Insurance Fund.

DISPOSITION IN THE LOWER COURT

Trial of the main action was before the Honorable A. H. Ellett sitting with a jury in Salt Lake County, Utah. The action was settled during trial for $60,000.00. After discussions with counsel the Court directed that the amount of the settlement be deposited with the Clerk of Court and payable to Bruce Worthen, The State Insurance Fund and Edward M. Garrett, attorney. An Order was then entered allowing Bruce Worthen to withdraw all funds deposited except the amount paid by the State Insurance Fund for medical expense and workmen's compensation. The Court then directed that the Department of Finance appear and show cause why it should not pay 25% of the retained amount as attorney's fees. Before hearing on the matter the facts of the workman's compensation and medical pay were stipulated to by counsel and the Court thereupon entered its Order providing in substance that the Commission of Finance was obligated to pay 25% of the retained amount as attorney's fees.

RELIEF SOUGHT ON APPEAL

The Commission of Finance seeks a reversal of the Court Order compelling it to pay attorney's fees.

STATEMENT OF FACTS

The statement of facts contained in the brief of Intervenor and Appellant is correct.

ARGUMENT

POINT I.

THE COMPENSATION CARRIER MUST PAY ITS PROPORTIONATE SHARE OF COSTS AND ATTORNEYS FEES AND ITS RECOVERY IS REDUCED BY THAT AMOUNT.

The sole purpose of this Appeal is to re-examine the reasoning in *McConnell vs. The Commission of Finance*, 13 Utah 2nd 395, 375 Pac. 2nd 394, as concerns the obligation of The State Insurance Fund to pay attorney's fees on its share of the recovery in a Third Party Tort action.

The statute involved is 35-1-62 UCA 1953 and reads as follows:

> When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of another person not in the same employment, the injured employee, or in case of death his dependents, may claim compensation and the injured employee or his heirs or personal representative may also have an action for damages against such third person. If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier shall become trustee of the cause of action against the third party and may bring and

maintain the action either in its own name or in the name of the injured employee, or his heirs or the personal representative of the deceased, provided the employer or carrier may not settle and release the cause of action without the consent of the commission.

If any recovery is obtained against such third person it shall be disbursed as follows:

(1) The reasonable expense of the action, including attorneys' fees, shall be paid and charged proportionately against the parties as their interests may appear.

(2) The person liable for compensation payments shall be reimbursed in full for all payments made.

(3) The balance shall be paid to the injured employee or his heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

In the case of *McConnell vs. The Commission of Finance*, 13 - Utah 2nd 395, 375 Pac. 2nd 394, this Court held under identical facts that the State Insurance Fund was not obligated to pay a proportionate share of the attorneys fees incurred in gaining a recovery in that action. The Court stated:

(1) That the State Insurance Fund was not a party to the action.

(2) That since the statute provides that the insurance carrier must be reimbursed in full, that the carrier would not be liable for its proportionate share of costs and fees.

We think the Court has erred in its interpretation of this statute.

Seemingly, there exists an inconsistency or conflict in sub-sections 1 and 2 in the statute. Under Sub-section 1 each party is charged a proportionate share of the costs of the action. Under sub-section 2 provision is made that the insurance carrier must be reimbursed for all payments made. Clearly, an insurance carrier cannot pay its share of the costs and be reimbursed in full at the same time. It doesn't add up. Our purpose here is to show that these sections can be reconciled and each given effect. In so doing the reasoning in the *McConnell* case, supra, must fall.

The first sub-section of the statute provides that the expense including attorneys fees of the law suit shall be paid and charged proportionately against the parties as their interests may appear.

The statute in sub-section 1 by its language obviously contemplates the fact that there are two parties involved in this type of Third Party law suit, namely, the injured employee and the insurance carrier. The statute visualizes a situation wherein an injured party has a Third Party case which is worth more in damages than the total of the medical expense and compensation paid by the insurance carrier to date. This Court has recognized this in its decision in *Rogalski vs. Phillips Petroleum Company*, 3, Utah 2nd 203, 282 Pac. 2nd 304. The Court

in that case decided that the language of the statute gives the insurance carrier a right of action but this is not a restriction on the injured employee who also has a cause of action against the Third Party.

The Court in the *McConnell* case, supra, seems to indicate that only when the compensation carrier is a party to the action does a situation arise where sub-section 1 of the statute has any application. In other words, if the injured employee files a law suit and recovers from the Third Party there is no room for the application of sub-section 1 because the compensation carrier must be reimbursed in full pursuant to sub-section 2. We do not believe that the legislature intended that the word "Party" should have such a narrow and restricted meaning. The appropriate definition of the word "Party" and applicable to our statute is contained in the case of *Fong Sik Leung v. Dulles*, 226 F.2d 74, (C.A. Cal.). The court defines the word party as follows:

> "In its broadest meaning the word party includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as formal party or not."

The compensation carrier is an interested party whether or not it is a party to the action and whether or not a law suit is even commenced. This situation, not contemplated by the *McConnell* case, is where a claim is settled with the Third Party with-

out a law suit being filed by the injured employee or the compensation carrier. Clearly, the compensation carrier is a party interested in the outcome of these proceedings.

If a Third Party claim were settled before suit then under the ruling of the *McConnell* case there would be no parties to apportion the cost against as set forth in sub-section 1 of the statute. There may however be attorney's fees incurred in the process of securing the settlement. Clearly the Legislature did not intend that a void be created in this area and it must be concluded that the word "Party" means those interested in the outcome of the settlement or the litigation.

If, however, the compensation carrier is not required to bear its proportionate share of the attorneys fees incurred, then in that situation subsection 1 of the statute would have no meaning and would never be given effect. Clearly, the Legislature had in mind the application of both sub-section 1 and sub-section 2. These two sections must be interpreted together and all of their terms given effect.. In order to do so the word "Party" in subsection 1 must be applied to both the insurance carrier and the injured employee.

The word "interest" in the first sub-section must also be given effect.

Assume a situation where an employee has received medical expense of $500.00 and compensation of $1,500.00 from the insurance carrier. He employs counsel to represent him in an action and agrees to pay the usual contingent fee of 1/3 of the amount recovered. Assume that the recovery is $2,400.00. This recovery is $400.00 greater than the total of compensation and medical expense paid by the carrier. To the extent of the $400.00 the injured employee has an "interest" in the recovery. This is the interest that is mentioned in sub-section 1 of the statute. The attorney's fee of 1/3 must be then applied against the recovery proportionately as the interest of the parties appears. If the 1/3 contingent fee is first deducted from the recovery of $2,400.00, then, of course, the interest of the injured workman is fully consumed and his interest in the excess over compensation and medical payments is used solely to pay attorney's fees and he receives nothing from his efforts in securing the recovery. He would then have no interest even though sub-section 1 specifically recognizes his interest in the recovery.

Assume further that the recovery was for only the payments made by the compensation carrier. Since the carrier did not employ counsel then under the ruling of the *McConnell* case, supra, the carrier would not be obligated to pay counsel because it

would be entitled to be paid in full. This is an injustice not intended by the legislature.

We recognize that sub-section 2 of the statute provides that the insurance carrier must be reimbursed in full for all payments made. The intent of the Legislature in this sub-section is simply to provide that the injured employee will not receive a double benefit and that the compensation carrier will not be compelled to compromise its claim for payments. This may be best shown by illustration: Assume a case where substantial medical and compensation payments were made but where the liability of the Third Party was doubtful. The Third Party might well be willing to pay the compensation and medical payments made plus some small amount for general damage but unwilling to pay the full value of the injuries. On the other hand the injured employee may be willing to agree to such a settlement providing that the insurance carrier would compromise its claim for payments made. A trial judge might likely be sympathetic to the claimant and attempt to apportion the various interests of the injured employee and the compensation carrier based upon the facts that liability of the Third Party was doubtful and that the case might well be lost if tried. It would be a temptation under those circumstances for a trial judge to compel the in-

surance carrier to take less than its full claim and this is precisely what sub-section 2 of the statute is designed to prevent.

This statute was not however designed to give the compensation carrier a free ride which is the result under the *McConnell.* As the situation now exists the compensation carrier need not and cannot be compelled to join in a Third Party suit, yet upon recovery, it is entitled to receive every cent paid out without bearing any of the burden of litigation.

In order to give full effect to both sub-sections of the statute in all cases, it must be interpreted to mean that whenever an insurance carrier pays compensation and a Third Party claim results it must participate proportionately in the costs and attorney's fees incurred.

Research into the various compensation laws of other states shows that they vary both in wording and intent from that of the Utah statute and hence the case law on this subject provides little in the way of precedent. There is one case, however, that is directly in point and supports the position of the Respondent here. In the case of *Charles Seligman Distributing Company vs. Brown,* 360 So. West 2nd 509 (Ky. 1962) the injured workman sued a Third Party and recovered damages. The Kentucky statute provides that the employee has to reimburse the employer or his insurer for the amount paid out

as compensation. Reversing two prior cases of that Court the Court stated and held:

> ". . . Moreover, regardless of the respective amounts recovered, where the employer or its insurer has a reasonable opportunity to intervene in the employee's action against the Third Party tortfeasor, but chooses not to do so it would be inequitable to require the employee to bear the attorney fees on that portion of the recovery which K.R.S. 342.055 obliges him to pay over to the employer or its insurer . . ." Supra at 510.

In this case the State Insurance Fund was aware of the institution of this action and made no effort to intervene to recover its payments made. Under the ruling of the *McConnell* case, supra, it would never be necessary for the carrier to intervene because the injured employee is obligated to reimburse the carrier in full. It is never responsible for payment of fees where the injured employee pulls the laboring oar. It is this injustice, not intended by the legislature, that must be corrected.

CONCLUSION

In a Third Party recovery under the Workmen's Compensation Statute it is provided: (1) That there shall first be deducted the expense of the action including attorneys fees which shall be charged against the parties as their interests may appear and (2) That the compensation carrier shall be reimbursed in full for all payments made. Under

the *McConnell* case only sub-section 2 of the statute is given effect. As a practical matter the insurance carrier achieves the benefits of successful litigation or settlement but is under no obligation to pay the expense.

The Legislature did not intend that the word "Party" as used in sub-section 1 should be restricted in its meaning to only those situations where the insurance carrier is a party to the suit. This leaves open that vast number of cases that are settled without litigation and where attorneys fees are incurred.

Nor did the legislature intend the "interest" of the injured workman would be consumed in the payment of expense; and certainly it could not have been intended that no expense would be incurred by the carrier if the recovery did not exceed the payments made.

The legislature intended that each party should pay its share of costs. This should apply whether the recovery is great or even where it does not exceed the payments made. The legislature further intended in Sub-section 2 that the carrier could not be compelled to take less than its payments after deducting its share of the expense.

This construction is the only one that accounts for the "interest" of each "party" in all actions

whether settled or filed and whether the recovery is great or small. Universal in application, it gives full force and effect to all terms of the statute.

Respectfully submitted,

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